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PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL., PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE NUCLEAR REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is reported at 533 F. 2d 1011.[1] The initial decision of April 5, 1974, by the Atomic Safety and Licensing Board of the Atomic Energy Commission is set forth at Pet. App. 65-186.[2] The decision of August 29, 1974, of the

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[1]The first opinion of the court of appeals (Pet. App. 23-61) is reported at 515 F. 2d 513. The instant decision follows this Court's remand of the proceeding to the court of appeals (Pet. App. 15-18; 423 U.S. 12).

[2]The Nuclear Regulatory Commission succeeded to the Atomic Energy Commission's licensing powers on January 19, 1975. Energy Reorganization Act of 1974, 88 Stat. 1233-1254. See 40 Fed. Reg. 3242, 3520.

Atomic Safety and Licensing Appeal Board, affirming the initial decision, is set forth at Pet. App. 187-219.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1976 (Pet. App. 1). Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on June 1, 1976 (Pet. App. 14). The petition for a writ of certiorari was filed on August 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission had jurisdiction to license the construction of a nuclear power plant on land bordering the Indiana Dunes National Lakeshore, despite a minimal environmental impact on the Lakeshore.

STATEMENT

This action was brought to review final orders of the Atomic Energy Commission, now the Nuclear Regulatory Commission (NRC), authorizing the issuance to the Northern Indiana Public Service Company (NIPSCO) of a construction permit for a 685-megawatt nuclear plant (the Bailly Generating Station) to be built on privately owned land on the southern shore of Lake Michigan in Porter County, Indiana, abutting the Indiana Dunes National Lakeshore (Pet. App. 66, 70).

NIPSCO filed an application for a construction permit on August 27, 1970 (Pet. App. 3). Pursuant to 42 U.S.C. 2241, an Atomic Safety and Licensing Board (ASLB) was constituted to hold hearings with respect to radiological health and safety and environmental issues. An environmental analysis was undertaken under the National Environmental Policy Act of 1969 (NEPA), 83

Stat. 852, 42 U.S.C. 4321 *et seq.* Pet App. 8-9. The ASLB heard almost 10,000 pages of testimony concerning NIPSCO's application (Pet. App. 12). An Assistant Secretary of the Department of the Interior appeared and testified. The ASLB issued its initial decision authorizing the issuance of a construction permit on April 5, 1974 (Pet. App. 65-186). Following an appeal by petitioner Porter County Chapter of the Izaak Walton League, the Commission's Atomic Safety and Licensing Appeal Board (ASLAB) affirmed the initial decision on August 29, 1974 (Pet. App. 187-219). The Department of the Interior was invited to submit its views, but did not do so. The ASLAB's decision is the final Commission decision (10 C.F.R. 2.786).

In its decisions, the Commission found that the impact of the Bailly plant on the adjoining Indiana Dunes National Lakeshore would be insubstantial (Pet. App. 203). The construction methods proposed by NIPSCO will avoid a significant reduction in the water table level of the Lakeshore (Pet. App. 117).[3] The Lakeshore is bounded by an industrial area containing several large smokestacks that are clearly visible from within the Lakeshore (Pet. App. 208, n. 46). Three generating plants are now located on the Bailly site; a Bethlehem Steel mill is located immediately to the south and west; and another steel mill and other industrial plants are nearby (Pet. App. 130, 201). These plants emit sulfur dioxide which becomes sulfuric acid when it combines with water; the additional moisture from the cooling tower for the proposed Bailly plant might result in a minor increase of sulfuric acid, but it could not have a significant recognizable

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[3]Currently, these methods include the construction of a slurry wall and the direct addition of water to any area in which a need is disclosed by prescribed monitors (Pet. App. 176, 116-117).

effect on local vegetation (Pet. App. 119-125). Similarly, as regards salt deposition from water droplets in the drift from the cooling tower plume, the Commission found that the projected salt deposition is small in comparision to natural deposition and less than that which results in damage (Pet. App. 125-128).

The Commission also considered the possibility of pollution from the operation of four ash ponds which are already present on the Bailly site. These ash ponds act as a series of settling basins to remove ash from the water pumped from existing units. Certain wastes from the proposed Bailly plant will also be discharged to the ash pond system. These wastes will include the filter backwash water and demineralized regenerate waste from the nuclear plant's demineralized water system. In addition, sanitary and sewage wastes will be routed to the ash ponds (following treatment). The Commission found that the ash ponds will be operated as a closed system and no wastes will be returned to Lake Michigan (Pet. App. 137-138). NIPSCO's license specifies that, if there should be seepage from the ash ponds during operation, NIPSCO will be required to institute remedial measures (Pet. App. 140, 176).[4]

Initially, the Seventh Circuit set aside the approval of the construction permit on the ground that the Atomic Energy Commission failed to follow its own regulations governing "population center distance" in relation to nuclear power plant siting. 515 F. 2d 513. This Court

[4]Moreover, as the court below noted (Pet. App. 5), NRC has imposed restrictions and controls as conditions to approval of the construction permit that include two monitoring programs to detect changes in chemical composition and water levels in the dunes area. These programs are designed to reveal problems as they arise, thereby enabling NRC to prescribe timely corrective measures (Pet. App. 112, 125, 176-177).

reversed and remanded, holding that the court of appeals was bound by the agency's interpretation of its own regulations. 423 U.S. 12.

On remand, the court of appeals denied the petition for review holding that the Commission had authority to issue the NIPSCO construction license, and that the decision to do so is supported by substantial evidence (Pet. App. 13).

ARGUMENT

The decision of the court of appeals is correct. It presents no conflict with prior decisions of any other court, and no issues meriting review by this Court.

NRC has full authority to license the construction of nuclear plants on privately owned land in the United States. See *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396. Nowhere in "the pervasive regulatory scheme embodied in the Atomic Energy Act of 1954" (*Train* v. *Colorado Public Interest Research Group*, No. 74-1270, decided June 1, 1976, slip op. 22), is there an exclusion pertaining to lands adjacent to a national park or lakeshore.

Petitioner argues that the Commission was deprived of its licensing jurisdiction under the Atomic Energy Act as soon as it determined that the construction and operation of the Bailly plant would have *any* adverse impact on the Indiana Dunes National Lakeshore (Pet. 16). None of the relevant statutes provides support, express or implied, for this argument. Neither NEPA, the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. 2011 *et seq.*, nor any provisions of the national park service organic act (39 Stat. 535, 16 U.S.C. 1 *et seq.*), or the Indiana Dunes

National Lakeshore Act, 80 Stat. 1309, 16 U.S.C. 460u *et seq.*, so provide.[5]

The provisions of NEPA have not created a bar to licensing plants near national parks or lakeshores. In fact, "NEPA was not intended to repeal by implication any other statute." *United States* v. *SCRAP*, 412 U.S. 669, 694. Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), requires only that the responsible federal agency "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Thus NEPA requires coordination among federal agencies, and this coordination was carried out.[6] NEPA does not

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[5]When Congress intends to limit the jurisdiction of federal licensing agencies on federal lands, it knows how to do so expressly. See, *e.g.*, 16 U.S.C. 1278, 42 U.S.C. 2097, 16 U.S.C. 797a.

[6]The Department of the Interior originally opposed the issuance of the construction permit, as petitioners note (Pet. 8-9). But the Department has never suggested that the alleged impact of the proposed plant on the Lakeshore deprived the Commission of jurisdiction to issue the permit, and, although invited to do so, elected not to express its views on the permit to the ASLAB, thus evidently deferring to the Commission's judgment on the matter.

One of the predominant concerns of the Assistant Secretary of the Interior who testified as a witness before the ASLB was that the "low population zone" surrounding the plant, which included about one and one-half miles of the National Lakeshore, would interfere with the Department's management of the area (Pet. App. 203). However, as the ASLAB expressly found, the "low population zone" is a site planning guideline, not a land use restriction (Pet. App. 204). 10 C.F.R. 100.1. Furthermore, the parts of the Lakeshore within the "low population zone" have been designated by the National Park Service as lands that will not be subjected to intensive, high population density use (Pet. 7, n. 6). In short, the zone that here embraces part of the Lakeshore will in no way interfere with the Interior Department's management of the Lakeshore. The Assistant Secretary acknowledged that there are other federal lands throughout the country under the Department's jurisdiction which fall within the low-population zones of other existing nuclear plants; the Department has encouraged the inclusion of recreational facilities within such zones (Tr. 7590-7596).

authorize, much less require, a federal agency to abdicate its regulatory duties to any federal agency having jurisdiction or special expertise with respect to any environmental impact involved.

If the issue were otherwise in doubt, the legislative history of the Indiana Dunes National Lakeshore Act, 16 U.S.C. 460u *et seq.*, shows that Congress intended that industrial growth outside the boundaries of the National Lakeshore *not* be impeded. As the ASLAB observed (Pet. App. 205-207; footnotes omitted):

> The unique features of the Indiana Dunes and wetlands have long been recognized by conservation-minded individuals. Nevertheless, over the years responsible public officials have reacted cautiously to proposals to reserve the area for recreational and scientific purposes exclusively. They did so not from lack of appreciation of the special dune-land environment, but out of strongly held views that the people of northern Indiana would be better served by industrial development in the area. Respected Indiana representatives reiterated in congressional hearings and debates their belief, right or wrong, that creation of new industry and new jobs took priority over establishment of new parks on the Indiana shores of Lake Michigan. [See, *e.g.*, Testimony of Congressman Madden in Hearings Before the Subcommittee on Rivers and Harbors, *et al.* of the House Committee on Public Works, on Burns Waterway, etc., 89th Cong., 1st Sess., Part II, 637-638 (1965); see also the remarks of Congressman Halleck of Indiana, 112 Cong. Rec. 26103-26104 (1966); remarks of Congressman Roush, *id.* at 26108.] For this reason those in favor of the National Lakeshore had to overcome the opposition of legislators preferring a new Indiana

industrial lakeport, to be known as Burns Harbor, in this same general area. The proponents of the harbor and the supporters of the lakeshore ultimately reached a compromise. The Indiana Dunes National Lakeshore Act was one part, the other was an authorization of federal funding for the Burns Habor development west of the Lakeshore near the Bailly site. Even strong congressional supporters of the Lakeshore agreed that its authorizing legislation "would not in any way be an impediment to industrial growth on privately held land beyond the Lakeshore boundaries."

* * * The act in so many words limits the Secretary of the Interior to acquiring land and easements only "within the boundaries of the Lakeshore." 16 U.S.C. § 460u-1. Those boundaries were not left to the Secretary to adjust but were literally mapped by Congress itself. 16 U.S.C. §460u. In contrast, where Congress has intended to place restrictions on surrounding properties to insure extra protection to the lands inside a park, it has so provided in unmistakable terms. For example, the Redwood National Park Act permits the Secretary of the Interior, to assure "the preservation of the scenery within the boundaries of the national park," to modify the park boundaries within certain limits, 16 U.S.C. § 79b(a), and to acquire easements over lands "on the periphery of the park" if deemed necessary for its protection. 16 U.S.C. § 79c(e). Similar discretion has been granted to the Secretary by Congress in connection with other parks.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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